**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

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|---|---|---|
| **KELLY WAYNE HANCE,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No.: 13-2656-STA-tmp** |
| | ) | |
| | ) | |
| **BNSF RAILWAY COMPANY d/b/a BURLINGTON NORTHERN & SANTA FE RAILWAY CO.** | ) | |
| | ) | |
| **Defendant.** | ) | |

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR COSTS**

Comes now Plaintiff, Kelly Hance, by and through undersigned counsel, and responds to Defendant's Motion for Bill of Costs [Docket Entry 96] as follows:

A judgement was entered in favor of the Defendant, BNSF, in the above referenced action on July 15, 2015. Defendant now seeks costs totaling $8,561.64.

While Rule 54 (d)(1) grants the district courts discretion to award costs to a prevailing defendant, *Marx v. General Revenue Corp.*, 133 S.Ct. 1166, 1171, 547 F. Supp. 348, 132 S.Ct. 1997 (2013), it conversely grants the district courts discretion to not award certain, or all, costs sought by a prevailing defendant.

In the case at bar, the defendant company seeks to recover $8,561.64 in costs [Defendant's Itemization for Motion for Costs] from Plaintiff, Kelly Hance. Contained within that amount is a request of $5,170.44 for "witness' mileage." Plaintiff asserts this amount is excessive for two primary reasons. First, the mileage submissions for all witnesses are doubled due to the fact that the first trial date was continued through no fault of Mr. Hance. The original trial [February 2015] was delayed due to severe winter weather (snow and ice), and ultimately, continued due to the unfortunate circumstance of Judge Anderson falling and breaking his wrist on ice, related to that winter storm. Thus, all parties had to travel back to their respective homes and reconvene for a second trial date in April 2015. Secondly, the mileage requests for witness, Maxine Kazen, who appeared at the trial from Spokane, WA, totals 8,036 miles, and comprises $4,620.72 (.575 per miles) of the requested mileage cost. The Defendant's Itemization does not indicate that she actually drove these miles to attend the trial. If entitled to any reimbursement of this cost, Mr. Hance believes the Court should consider the actual cost of the travel (ie: air travel). Further, all of the events surrounding Ms. Kazen, as they relate to this case, took place in Birmingham, AL, thus, Mr. Hance should not be taxed with such a high cost of travel for Ms. Kazen, who later relocated to Washington State.

Finally, Plaintiff Hance submits to the Court that pursuant to 38 U.S.C. section 4323 (h)(1) [USERRA Statute] "No fees or court costs may be charged or taxed against any person claiming rights under this chapter."

Plaintiff, Kelly Hance prays the Court decline to award any costs to the Defendant. However, in the alternative, Plaintiff prays the Court will limit any Order for costs based on the above arguments.

Respectfully Submitted,

/s/ *K. Cody Allison*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of October, 2016, I caused the foregoing to be served, via the Court's electronic filing system, on the following:

W. Chris Harrison, TN Bar No. 18689
Russell W. Jackson, TN Bar No. 027322
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*/s/ K. Cody Allison*